CASE BLURBS
January 2019

Mary Ellen Von Ancken, et al. v. 7 East 14 L.L.C.
Supreme Court of the State of New York, Appellate Division, First Department, November 27, 2018

Plaintiffs, the purchasers of a cooperative apartment, commenced an action against the sponsor of the co-op and the listing agent (together, the "Defendants") alleging that Defendants made a material misrepresentation about the size of the apartment and that plaintiffs "reasonably relied on that misrepresentation in purchasing the apartment." Specifically, plaintiffs allege that a floor plan prepared with the listing stated that the apartment was approximately 1,966 square feet when it was only 1,495 square feet. Plaintiffs alleged that the floor plan was incorporated into the offering plan by reference which was then incorporated into the purchase agreement. Premised upon that alleged misrepresentation, plaintiffs asserted claims for breach of contract and express warranty, fraud, aiding and abetting fraud, negligent misrepresentation and violations of sections 349 and 350 of the General Business Law ("GBL"), relying upon specific language contained in the offering plan:

> "Any floor plan or sketch shown to a prospective purchaser is only an approximation of the dimensions and layout of a typical apartment. The original layout of an apartment may have been altered. All apartments and terraces appurtenant thereto are being offered in their 'as is' condition. Accordingly, each apartment should be inspected prior to purchase to determine its actual dimensions, layout and physical condition."

The Defendants moved to dismiss the complaint, the lower court granted Defendants' motion, and the Appellate Division affirmed. The Appellate Division held that the lower court properly dismissed plaintiff's breach of contract claims finding that the doctrine of incorporation by reference did not apply because it is "appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document beyond all reasonable doubt." The Appellate Division reasoned that since the listing was not identified in any of the relevant purchase documents it is not incorporated by reference and therefore "any alleged representation in the listing cannot form the basis of a breach of contract claim because the listing is not a part of the purchase agreement" and there was "no express warranty made in the purchase agreement."

Additionally, the Appellate Division held that any alleged misrepresentations were refuted by the terms of the purchase agreement, which stated that no representations are being made by the sponsor, that the unit was being purchased "as is" and that it was the buyer's duty to inspect "to determine the actual dimensions" prior to purchasing the apartment.

The Appellate Division also held that the lower court properly dismissed plaintiffs' claims for fraud, aiding and abetting fraud and negligent misrepresentation. In so holding, the Appellate Division determined that plaintiffs could not, as a matter of law, establish reasonable reliance on any representation as they had the means to obtain the true size by inspecting and measuring the apartment and therefore the dismissal of the fraud, aiding and abetting fraud and negligent misrepresentation were proper.

Last, the Appellate Division held that the lower court properly dismissed plaintiffs cause of action for violations of GBL §§ 349 and 350 because these causes 'do not fall within the type of deceptive acts, that, if permitted to continue, would have a broad impact on consumers at large" because they are specific to this transaction and do not fall within the statute. The Appellate Division added that pursuant to the Martin Act, the Attorney General has exclusive jurisdiction to prosecute sponsors who make false statements in offering plans and therefore the plaintiffs did not have standing to pursue such claims.

345 East 50th LLC v. The Board of Managers of M at the Beekman Condominium
Supreme Court of the State of New York, Appellate Division, First Department, November 27, 2018

Plaintiffs, unit owners in a condominium, commenced an action against the Condominium and each of the individual members of the Board of Managers (the "Board") for alleged damages in connection with certain renovations plaintiffs made to their unit. In November 2013, the Board approved plaintiffs' plans to renovate the portion of the roof deck, to which plaintiffs have exclusive use pursuant to the By-Laws. Plaintiffs completed their renovations in May 2014. A few days after the renovations were completed, the Board informed plaintiffs that the improvements they made would have to be removed at their own cost to facilitate a roof replacement to address a water infiltration issue.

Plaintiffs alleged that the individual members of the Board were liable for breach of fiduciary duty and fraud in that the individual Board members: "1) misrepresented and failed to disclose the Board's plan to replace the roof at the time Plaintiff applied for consent to carry out the deck improvements; and 2) affirmatively continued to encourage Plaintiff to carry out the deck improvements during the time Plaintiff was installing the deck, while failing to disclose the Board's plans to replace the roof." The individual members of the Board moved to dismiss the complaint against on the basis that their actions were protected by the business judgment rule. The lower court agreed and granted the motion.

On appeal, plaintiffs argued that the individual members of the Board were not protected by the business judgment rule because the Board singled them out for disparate treatment and the members acted out of self-interest. The Appellate Division affirmed the lower court's decision holding that the individual members of the Board were protected by the business judgment rule and that the roof was replaced to "further condominium's interest, even if plaintiffs may have been damaged as a result, and there was no evidence of bad faith."

The Appellate Division rejected plaintiffs' disparate treatment argument on the basis that any disparate treatment cited by plaintiffs occurred after the Board's decision to replace the roof, which was a proximate cause of plaintiffs' damages. Plaintiffs also failed to provide evidence that the individual members of the Board were motivated by their self-interest or obtained any individual benefit from the decision to replace the roof.

The Appellate Division also rejected plaintiffs' argument that the individual members of the Board breached their fiduciary duty by failing to inform themselves about the status of plaintiffs' renovations before considering the roof replacement. The record demonstrated that the Board consulted with engineers and building management concerning the requirement to replace the roof and that more limited measures to remedy the water infiltration problem proved unsuccessful. Additionally, the status of plaintiffs' renovations was not relevant to the Board's interest in maintaining the integrity of the building.

Core Development Group, LLC and Royal Renovation Corp. v. Alexandra Jackson
Supreme Court of the State of New York, Appellate Division, First Department, November 1, 2018

In *Core Group v. Jackson*, a developer/contractor that did not have a home improvement contractor or salesperson's license contracted with a cooperative shareholder for the renovation of her apartment, a project that clearly comes within the ambit of the laws governing home improvement contracting in New York City. The shareholder paid bills as the project went along, but a dispute arose over the final invoice. The contractor (Core) filed a notice of mechanic's lien, but the lien was dismissed as untimely. When Core filed a lawsuit to collect on the unpaid invoice, the shareholder argued that because Core was unlicensed, it could not recover. Core then amended its complaint to add a new plaintiff, Royal Renovation Corp., who allegedly did or subcontracted out the actual work and who had a home improvement contractor's license. Core eventually conceded it could not recover, but Royal argued that it could sue both in contract and quasi-contract for unjust enrichment and quantum meruit.

Affirming dismissal of the amended complaint, the First Department held that Royal could not recover in contract because it had no contractual relationship with the defendant shareholder. At most, it was copied on emails between Core and defendant's architect negotiating the terms of the contract. However, all invoices came from Core, all payments went to Core, and only Core filed notices of mechanic's liens.

The Appellate Division also held that the facts did not support an inference that Royal had a reasonable expectation of compensation from defendant, as opposed to from Core, and thus affirmed dismissal of Royal's quasi-contract claims.

Wade Johnson, et al., v. Joel Levin, et al. and 1150 Fifth Avenue Owners Corp.
Supreme Court of the State of New York, Appellate Division, First Department, October 16, 2018

Plaintiffs, shareholders in the defendant cooperative housing corporation (the "Co-Op") commenced an action against the trustees of a trust, who previously owned the apartment (the "Seller") and the Co-Op (collectively, the "Defendants"). Plaintiffs claimed that Defendants fraudulently misrepresented and concealed dangerous defects of a previously gut-renovated apartment, which were only uncovered when Plaintiffs performed a subsequent renovation.

Plaintiffs sued under the theories of breach of contract and fraud in the inducement against the Seller, breach of contract against the Co-Op and negligent misrepresentation against the Defendants.

The Co-Op moved to dismiss the complaint on the basis that the alteration agreement required Plaintiffs to assume all defects in the apartment and keep the apartment up to code and the Co-Op itself owed no fiduciary duty to Plaintiffs prior to purchasing the apartment.

The Supreme Court granted the Co-Op's motion to dismiss holding that Plaintiffs failed to prove that the Co-Op was a party to the transaction and the complaint stated no meritorious claim of fraud against the Co-Op.

Plaintiffs appealed and the Appellate Division agreed with the lower court, stating that "a cooperative does not owe a fiduciary duty to purchasers of units with respect to conduct that occurred before the purchase." Additionally, it was noted that "the complaint alleges that plaintiffs were aware that the unit had undergone significant renovations two years earlier, and yet they failed to inspect the renovations or inquire as to whether any issues had occurred with respect to the renovations."

Andrew Lusk v. 170 West 81st Owners Corp., Michelle Simmons, John Reardon, Gabriel Sperber and Mary Anne Nidry

Supreme Court of the State of New York, County of New York, September 14, 2018

Petitioner, a shareholder in the defendant cooperative housing corporation (the "Co-Op") commenced an Article 78 proceeding against the Co-op seeking a declaratory judgment preventing the Co-Op from attempting to rescind a prior agreement between the parties that allowed Petitioner to unconditionally purchase a second apartment in the Co-Op.

Petitioner, already the owner of the shares appurtenant to apartment 5D, entered into a contract of sale to purchase the shares appurtenant to apartment 5E to combine the two apartments. After reviewing the purchase application, in a June 6, 2018 e-mail, the Co-Op's Board of Directors (the "Board") advised Petitioner that it would approve the sale under two conditions: (1) Petitioner was required to add an additional $125,000 into his savings account and (2) Petitioner was required to deposit one years' maintenance ($26,652) to be held in escrow for a period of one year (the "June 6 Offer"). In conveying the June 6 Offer, the Board did not reserve the right to modify or change the terms. Petitioner accepted the June 6 Offer and complied with the terms. Thereafter, in a June 22, 2018 e-mail, the Board notified Petitioner that the terms of the June 6 Offer had changed and that the Board would only approve the purchase if Petitioner deposited $125,000 into escrow within one week; instead of the agreed upon amount of $26,652 (the "June 22 Offer"), failing which the Board would rescind the June 22 Offer and reject the purchase. Petitioner rejected the June 22 Offer and the Board rejected Petitioner's proposed purchase of apartment 5E.

Petitioner commenced the Article 78 proceeding on the basis that, among other things, the June 6 Offer was a binding commitment and that the Board's arbitrary attempt to rescind it was not protected by the business judgment rule. The trial court agreed, granted Petitioner's petition to compel the Co-op to accept the June 6 Offer and approve Petitioner's purchase of apartment 5E. In doing so, the trial court reasoned that the June 6 Offer was "a conditional but binding commitment upon which Petitioner was entitled to rely" and the Board's attempt to rescind the June 6 Offer was improper and not protected by the business judgment rule.

M&E 73-75 LLC v. 57 Fusion LLC

Supreme Court of the State of New York, County of New York, September 5, 2018

57 Fusion, LLC ("57 Fusion"), is the owner of a building located at 57 Stanton Street, New York, New York (the "Property"). In 2011, a real estate broker approached 57 Fusion to inquire about purchasing the Property. In November of 2011, 57 Fusion entered into a contract to sell the Property to M&E 73-75, LLC ("M&E") for $2.8 million. Thereafter, the parties agreed to a "time is of the essence" closing date of May 14, 2012. However, three days before the scheduled closing, M&E told 57 Fusion that it believed the tax classification for the Property was incorrect, that the assessed taxes for the Property should have been higher, and that the purported misclassification created a title defect and diminished the value of the Property. M&E also stated that it would not proceed with the closing without a substantial reduction in the purchase price.

Under the contract, if 57 Fusion was unable or unwilling to convey clear title to the Property, M&E had the option to close with a credit of $25,000 or terminate the contract. 57 Fusion offered to close with a credit to M&E of $50,000, more than what was called for under the contract. M&E rejected that offer but refused to terminate the contract. Although both parties appeared for the closing on May 14, 2012, M&E refused to close on the sale.

M&E's principal is Steven Croman, a real estate developer who pleaded guilty in 2017 to felony tax fraud, grand larceny, and falsifying business records. He was sentenced to serve a year in prison and to pay $5,000,000 in restitution.

M&E commenced a lawsuit against 57 Fusion on June 13, 2012, asserting claims for reformation of contract due to fraud-based unilateral mistake, specific performance with a price reduction, specific performance, and breach of contract. M&E's complaint sought to compel 57 Fusion to sell the Property at a reduced price and pay damages. M&E also filed a notice of pendency to prevent 57 Fusion from selling the Property. After discovery, 57 Fusion filed a motion to dismiss on the grounds that M&E had failed to allege valid claims. The motion also sought to vacate the notice of pendency.

The trial court granted 57 Fusion's motion in its entirety and dismissed all of M&E's claims. It held that M&E had failed to state a claim for fraud-based reformation because it did not allege any misrepresentation by 57 Fusion and the parties' contract did not contain any representations regarding the tax status of the Property. In addition, the trial court dismissed M&E's claims for specific performance and breach of contract because M&E had not sufficiently alleged that it had complied with the parties' contract, and because M&E had breached the contract by seeking remedies that were not authorized under the contract.

Based on its dismissal of M&E's claims, the trial court also cancelled the notice of pendency and awarded 57 Fusion its costs and attorneys' fees associated with the notice of pendency.

Philip Perrault v. Village Dunes Apartment Corp.

Supreme Court of the State of New York, Appellate Division, Second Department, August 22, 2018

Plaintiff, a shareholder in the defendant cooperative housing corporation (the "Co-Op") sought approval from the Co-op's Board of Directors (the "Board") of plaintiff's alteration application to perform certain alterations in his apartment. Specifically, plaintiff sought to raise the height of the ceiling in an area of his apartment by enclosing a portion of common area space above the apartment for his exclusive use, and to replace the window in the apartment with one of a different type and size. The Co-Op's proprietary lease provided that the Board could not unreasonably withhold consent to a proposed alteration "in the unit or building." After the Board rejected plaintiff's alteration request, plaintiff sued the Co-Op for breach of contract and for an injunction authorizing the proposed alterations. The Co-Op moved for summary judgment dismissing the complaint and the lower court granted the motion. Plaintiff appealed.

The Appellate Division affirmed the trial court's dismissal of the complaint against the Co-Op. In doing so, the Appellate Division noted that in light of the language in the proprietary lease, the Board's decision must be reviewed under a reasonableness standard and is not protected by the business judgment rule. The Appellate Division held that the Board demonstrated that its decision denying plaintiff's alteration request was reasonable as it was "legitimately related to the welfare of the cooperative" and plaintiff failed to raise a triable issue of fact.

Jose Cruz et al v. Seward Park Housing Corp. et al,

Supreme Court of the State of New York, County of New York, July 6, 2018

This decision involves a motion for attorneys' fees stemming from the successful defense of an Article 78 proceeding by the law firm of Greenberg Traurig's ("GT").

Seaward Park Housing Corporation ("Seward Park"), is a cooperative housing corporation which included both a residential building and a parking garage. Seward Park's Board of Directors (the "Board") voted to switch from a "park and lock" system to a valet parking system in the garage. A group of shareholders (the "Petitioners") who parked in the garage sought to annul the Board's decision on the grounds that: (a) there was not enough advance notice of the vote, (b) the Board exceeded its authority in making the determination, and (c) the contract with the garage was illegal.

Seward Park moved to dismiss the petition on the grounds that the filing of the Article 78 was untimely, and the Board's decision was protected by the business judgement rule. The trial court agreed and granted Seaward Park's motion.

GT requested $254,000.00 in attorneys' fees for all work performed up to the date of the hearing. After a hearing, the special referee issued a 23-page report recommending the award of attorneys' fees in the amount of $161,000.00. The referee reduced the amount for alleged double billing, block billing, lack of complexity and failure to use more associates. GT moved to affirm in part and reject in part the referee's recommendations. In its motion, GT alleged that pursuant to Seward Park's by-laws, it was entitled to fees on fees and therefore requested an additional $166,396.00 for the hearing itself and for analysis of the referee report.

Petitioner's cross-moved to affirm the recommendation of the referee but also to reduce the amount even further because GT's hourly rates were excessive and the firm used partners rather than associates for much of the work. In GT's reply, an additional $37,827.00 in fees and $5,941 in disbursements was also requested making the total request of attorneys' fees $464,164.00.

The Court looked at the fees from two different perspectives:

The first discussed the "staggering sum" of $464,164.00 to defend a "relatively straight forward CPLR Article 78 petition" as "shocking and disturbing, highway robbery without the six-gun, and that the figure in it of itself seems like a typographical error or an April fool's joke, that a person could purchase real estate throughout New York for that amount."

The second perspective acknowledged that GT's papers were well written and well-reasoned, continuing that "fish gotta swim, birds gotta fly and lawyers gotta litigate" and ending admitting that "GT did what lawyers do, submitted excellent papers and prevailed."

In its decision, the Court granted Seward Park $175,000 in attorneys' fees holding that the hourly rates were reasonable, and the attorneys completed the work performed. The Court rejected the findings from the referee that: "(a) the amount awarded should be reduced because of double billing, as the attorneys were collaborating, not duplicating; (b) the block billing was improper because determining what work GT did, and that the work was on this case, was easy enough; and (c) that GT should have used more associate time, because experienced partners charge more but work quicker."

However, in reducing the attorneys' fee award, the Court explained that in the initial motion to dismiss based on the statute of limitations, Seward Park should not have included a fact-based determination based upon the business judgment rule because "on a pre-answer motion pursuant to CPLR 7804(f) no additional facts alleged in support of the motion may be

considered." The Court also felt that GT could utilized a mid-level associate to dismiss the case as untimely rather than two partners.

811 Walton Tenants Corp. v 811 Walton Rescue LLC,

Supreme Court of the State of New York, Appellate Term, First Department, July 2, 2018

811 Walton Tenants Corp., a cooperative corporation ("Co-Op"), commenced a holdover proceeding against 811 Walton Rescue, LLC, a shareholder/proprietary lessee (the "Lessee") and Lessee's subtenant, Thomas Smith ("Subtenant"). The Co-op alleged that the Lessee and/or Subtenant caused a bedbug issue in Apartment E9 (the "Apartment") owned by the Lessee and occupied by the Subtenant) and in other areas of the building.

On or about September 2, 2016, the Co-Op sent a default notice (the "Default Notice") to the Lessee stating that the Subtenant violated certain terms of the proprietary lease by causing bed bugs to be prevalent for about three years in the Apartment. After receiving the Default Notice, the Lessee treated the Apartment twice to address the bed bug infestation. On or about December 22, 2016, the Co-Op served the Lessee and Subtenant with a notice of termination (the "Termination Notice") based on the non-curable nuisance caused by the bed bug infestation. When the Lessee and Subtenant failed to vacate upon the expiration of the Termination Notice, the Co-Op commenced a holdover proceeding to evict the Lessee and Subtenant from the Apartment.

The Lessee moved to dismiss the petition on the ground that the that Co-Op failed to comply with the terms of the proprietary lease (the "Lease") in terminating the Lessee's tenancy. Specifically, the Lessee alleged that the Co-Op failed to serve a notice to cure, as required by the proprietary lease, and instead served the Default Notice. The Co-Op cross-moved to strike the Lessee's affirmative defenses. The Housing Court granted the Lessee's motion to dismiss holding that the Co-Op failed to serve the proper notice to terminate the proprietary lease. The Co-Op appealed arguing that a notice to cure was not necessary since the Lessee's objectionable conduct was "non-curable." The Appellate Term affirmed the Housing Court's decision dismissing the petition. In doing so, the Appellate Term held that the undisputed evidence established that the Co-Op failed to follow the requisite procedures set forth in the proprietary lease in terminating the Lessee's tenancy based upon his non-curable objectionable conduct, including obtaining the authorization by a 2/3 majority of the Board of Directors.

Fairmont Tenants Corp. v. Michael Braff

Supreme Court of the State of New York, Appellate Division, First Department, June 7, 2018

Plaintiff, a cooperative housing corporation (the "Co-Op") commenced this action against shareholders Michael Braff and Gladys Wanich (collectively the "Defendants") for a declaratory judgment to declare that the Defendants did not have a right to use and occupy a portion of the roof adjacent to their apartment.

The Defendants, who were able to enter the roof space through a window in the apartment had been doing so for nearly thirty years, despite never having the permission from the Board of Directors (the "Board"). The Defendants argued that they had exclusive use of the roof for more than ten years and thus they owned it based on the theory of adverse possession. The Defendants also argued that the Co-Op waived its right to challenge the use of the roof.

The Co-Op argued that pursuant to the proprietary lease, the apartment did not include roof space and thus the Defendants did not possess any ownership rights over any portion of the roof. Both parties moved for summary judgment and the Supreme Court granted judgment in

favor of the Co-Op, holding that the proprietary lease (the "Lease") and the offering plan (the "Plan") specifically identified the apartments with terraces with a "T" and that terraces "are accessible through a door from the apartment." In the Plan, the apartment did not have a "T,' therefore it did not have exclusive right to a terrace. Additionally, in analyzing the share allocations for apartments in the buildings, shares increased if the apartment had a terrace. In comparing the Defendants' apartment with other similarly sized (non-terraced) apartments, the share allocation was similar.

On appeal, the Appellate Division affirmed the decision of the lower court, first looking at the Lease. The Lease defined the apartment as: "the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the apartment."

Given that the language in the Lease did not expressly define or allocate the disputed space, the Court looked to the Plan which made clear that no outdoor space was allocated exclusively to the Defendants apartment.

The Appellate Division was also not persuaded by the waiver argument as the Lease included a "no waiver" clause or the adverse possession claim because the possession was not exclusive (building staff entered the roof on various occasions).

Renwick, J.P., Tom, Webber, Moulton, JJ.

7728 Mary Ellen Von Ancken, et al., Index 156497/13
Plaintiffs-Appellants,

-against-

7 East 14 L.L.C., et al.,
Defendants-Respondents,

Gordon & Haffner, LLP, Harrison (Steven R. Haffner of counsel), for appellants.

Moses & Singer LLP, New York (Jay R. Fialkoff of counsel), for 7 East 14 L.L.C., respondent.

Law Offices of Solomon J. Jaskiel, Brooklyn (Solomon J. Jaskiel of counsel), for Nest Seekers International LLC and Nest Seekers LLC, respondents.

Order, Supreme Court, New York County (Debra James, J.), entered February 24, 2017, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs allege that defendants, the sponsor of a cooperative and its listing agent, made a material misrepresentation about the size of the apartment unit, and that they reasonably relied on that misrepresentation in purchasing the apartment.

Specifically, plaintiffs allege that defendants prepared a floor plan, which accompanied the listing for the unit at issue, that stated that the unit was "~1,966" square feet, when it was,

in fact, approximately 1,495 square feet. Plaintiffs contend that the floor plan was incorporated into the offering plan by reference, and the offering plan, in turn, was incorporated into the purchase agreement. They rely on the following language contained in the offering plan:

> "Any floor plan or sketch shown to a prospective purchaser is only an approximation of the dimensions and layout of a typical apartment. The original layout of an apartment may have been altered. All apartments and terraces appurtenant thereto are being offered in their 'as is' condition. Accordingly, each apartment should be inspected prior to purchase to determine its actual dimensions, layout and physical condition."

Based on the alleged misrepresentation incorporated into the purchase agreement, plaintiffs assert claims for breach of contract and express warranty, fraud, aiding and abetting fraud, negligent misrepresentations and violation of General Business Law §§ 349 and 350.

The doctrine of incorporation by reference "is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document 'beyond all reasonable doubt'" (*Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 252 [1st Dept 1995]). Here, the listing is not identified in any of the relevant purchase documents, let alone

beyond all reasonable doubt, and therefore is not incorporated by reference. Thus, any alleged representation in the listing cannot form the basis of a breach of contract claim because it is not a part of the purchase agreement. No express warranty was made in the purchase agreement.

Moreover, any purported representation or warranty is refuted by the clear terms of the purchase agreement, which contains a merger clause, states that no representations are being made by the sponsor, that the unit was being purchased "as is" and that the onus was on the buyer to inspect "to determine the actual dimensions" prior to purchasing (*see Rozina v Casa 74th Dev. LLC*, 115 AD3d 506 [1st Dept 2014], *lv dismissed* 24 NY3d 1097 [2015]; *Plaza PH2001 LLC v Plaza Residential Owner, LP*, 98 AD3d 89 [1st Dept 2012]).

Reasonable reliance is an element of claims for fraud, aiding and abetting fraud and negligent misrepresentation (*see Bernstein v Clermont Co.*, 166 AD2d 247 [1st Dept 1990]; *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Plaintiffs cannot as a matter of law establish reasonable reliance on a representation concerning the condition of the apartment since they had the means to ascertain the truth of the condition (*Bernstein* at 248). Since, pursuant to the terms of

the purchase agreement, plaintiffs had the opportunity to inspect and measure the apartment, their fraud and negligent misrepresentation claims were properly dismissed. Consequently, dismissal of the aiding and abetting fraud claim was also proper (*see Kaufman v Cohen*, 307 AD2d 113, 125-126 [1st Dept 2003]).

Finally, plaintiffs' allegations based on purported representations made in the listing fail to set forth a viable claim under General Business Law §§ 349 or 350, as they do not fall within the type of deceptive acts, that, if permitted to continue, would have a broad impact on consumers at large (*see Thompson v Parkchester Apts. Co.*, 271 AD2d 311 [1st Dept 2000], *lv dismissed* 92 NY2d 946 [1998]). This dispute, involving the dimensions of an apartment and representations made regarding the size of that apartment, is unique to the parties to this transaction, and thus, does not fall within the ambit of the statute (*id.*). Additionally, since, pursuant to the Martin Act, the Attorney General has exclusive jurisdiction to prosecute sponsors who make false statements in offering plans filed thereunder, plaintiffs have no standing to pursue the claims to the extent they are based on any representations purportedly incorporated into the offering plan (*id.; 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 285 AD2d 244 [1st Dept 2001], *affd*

in part on other grounds 98 NY2d 144 [2002]; *Merin v Precinct Devs. LLC*, 74 AD3d 688 [1st Dept 2010]).

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7721 345 East 50th Street LLC, et al., Index 154185/15
Plaintiffs-Appellants,

-against-

The Board of Managers of M at Beekman Condominium, et al.,
Defendants-Respondents.

Seyfarth Shaw LLP, New York (Jeremy A. Cohen of counsel), for appellants.

Gartner & Bloom PC, New York (William M. Brophy of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 20, 2017, which, inter alia, granted the individual defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The court properly dismissed the complaint as against the individual defendants based on the business judgment rule (*see generally Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]). The record demonstrates that the roof was replaced to further the condominium's interest, even if plaintiffs may have been damaged as a result, and there was no evidence of bad faith (*see 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-736 [1st Dept 2013]).

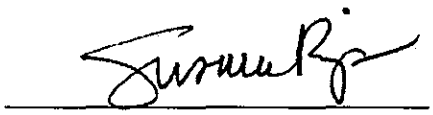
Plaintiffs argue that the individual defendants were not protected by the business judgment rule because they were singled out for disparate treatment, and the individual defendants acted out of self-interest. However, the disparate treatment cited by plaintiffs occurred after the board's determination to replace the roof, which was a proximate cause of plaintiffs' damages. Plaintiffs also failed to provide evidence that the individual defendants were motivated by their self-interest, or obtained any individual benefit from the decision to replace the roof.

Plaintiffs argument that the individual defendants breached their fiduciary duty by failing to inform themselves about the status of plaintiffs' renovations to their unit before considering the roof replacement, is unavailing. The record shows that the board consulted with engineers and building management concerning the necessity to replace the roof and alternative actions to remedy the water infiltration, and that more limited measures were unsuccessful. The status of plaintiffs' renovations was not relevant to the board's interest in maintaining the integrity of the building (*see Messner v 112 E. 83rd St Tenants Corp.*, 42 AD3d 356, 357 [1st Dept 2007], *lv dismissed* 9 NY3d 976 [2007]).

We have considered plaintiffs' remaining contentions, including that the motion should have been denied because discovery was not complete, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 27, 2018



CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Gische, Tom, JJ.

7542 Core Development Group, LLC, Index 650577/16
Plaintiff,

Royal Renovation Corp.,
Plaintiff-Appellant,

-against-

Alexandra Jackson,
Defendant-Respondent.

Tarter Krinsky & Drogin LLP, New York (Christopher Tumulty of counsel), for appellant.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Stephen H. Orel of counsel), for respondent.

Order, Supreme Court, New York County (David B. Cohen, J.), entered July 11, 2017, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Core Development Group, LLC (Core), a builder and developer, sued defendant based upon an alleged breach of a contract to renovate her apartment. When it was discovered that Core did not have proper licensure to bring the action, it amended its complaint to add Royal Renovation Corp (Royal), a licensed home improvement contractor, as a named plaintiff. The amended complaint alleged that defendant entered into a contract with both Core and Royal, even though the original complaint made no

mention of Royal.

Dismissal of the amended complaint was warranted as the documentary evidence submitted by defendant contradicted Royal's claim that it had a contractual relationship with defendant (*Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 298 [1st Dept 2006], *lv dismissed* 11 NY3d 801 [2008]; *see Bovis Lend Lease LMB Inc v GCT Venture*, 285 AD2d 68, 69 [1st Dept 2001]). Negotiation e-mails regarding the price and scope of the renovation project were solely between defendant's architect and Core's president and CEO. The fact that Royal was copied on those emails is of no moment. Invoices were issued by Core, on its letterhead, and all payments were made payable to Core. Finally, when the dispute arose over final payment, Core was the only entity that filed notices of mechanic's liens against defendant.

Royal's quasi contractual claims were also properly dismissed, as the facts do not support an inference that Royal had a reasonable expectation of compensation from defendant (*Sears Ready Mix, Ltd. v Lighthouse Mar., Inc.*, 127 AD3d 845, 846 [2d Dept 2015]).

We have considered Royal's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 1, 2018

CLERK

Renwick, J.P., Tom, Gesmer, Singh, JJ.

7333 Wade Johnson, et al.,
Plaintiffs-Appellants,

Index 157660/15
595766/15

-against-

Joel Levin, et al.,
Defendants,

1150 Fifth Avenue Owners Corp.,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

Kasowitz Benson Torres LLP, New York (Jessica T. Rosenberg of counsel), for appellants.

Braverman Greenspun, P.C., New York (Jonathan Kolbrener of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 16, 2017, which, to the extent appealed from, granted defendant 1150 Fifth Avenue Owners Corp.'s motion to dismiss the cause of action for fraudulent or negligent misrepresentation as against it, unanimously affirmed, without costs.

The allegations that defendant coop induced plaintiffs to enter into a purchase agreement through misrepresentations and omissions concealing dangerous defects in the subject unit fail to state a cause of action, because a cooperative does not owe a fiduciary duty to purchasers of units with respect to conduct

that occurred before the purchase (*see Woods v 126 Riverside Dr. Corp.*, 64 AD3d 422, 423 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). Moreover, the complaint alleges that plaintiffs were aware that the unit had undergone significant renovations two years earlier, and yet they failed to inspect the renovations or inquire as to whether any issues had occurred with respect to the renovations (*see id.*). The special facts doctrine is not applicable as plaintiffs knew about the renovations and could have, but chose not to, inquire about them (*see Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]).

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 16, 2018

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

INDEX NO. 157152/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

ANDREW LUSK,

Petitioner,

- v -

170 WEST 81ST OWNERS CORP., MICHELLE SIMMONS, JOHN REARDON, GABRIEL SPERBER, MARY ANNE NIDIRY

Respondents.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 21, 22, 23, 24, 25, 26, 27

were read on this motion for ARTICLE 78 (BODY OR OFFICER) RELIEF.

Upon the foregoing documents, this CPLR Article 78 petition is hereby granted, as set forth more fully herein.

Preamble

New York City denizens must suffer through a variety of afflictions that are almost biblical in nature: buses that crawl; subways that stall; high prices at the mall; cold weather in the fall; a Flushing Team that can't play ball; friends that don't call; neighbors with gall; graffiti in the hall; plumbing expensive to install; buildings too tall; looking out your window at a wall. But seriously, the drawbacks to city living are legendary: high prices; crowded sidewalks; noise pollution; air pollution; bedbugs and cockroaches; prevalent crime; transportation tottering on the brink; vast income inequality; inadequate schools. And then there's that ubiquitous limitation on the quality of life; that thorn-in-the-urbanite's-side: the imperious Co-op building Board of directors. The one at issue here, the board of directors ("the Board") of respondent 170 West 81st Street Owners Corp. is attempting to prevent petitioner, Andrew Lusk, from purchasing the apartment (5E) next to his (5D) and combining them for his growing family, which is all he wants to do.

Background

This CPLR Article 78 proceeding arises from the Board's attempt to rescind its prior agreement to permit petitioner and his wife, Dana, conditionally, to purchase the shares associated with Unit 5E. Petitioner has been living in the building for five years and has always promptly paid his maintenance. The maintenance on the "new" apartment is a rather modest sum for this day and age.

On February 22, 2018, Lusk and non-party Stacey V. Judd, Unit 5E's owner and shareholder, entered into a contract of sale pursuant to which Judd agreed to sell the co-op shares allocated to Unit 5E for $679,500 ("the Proposed Sale"). On June 6, 2018 ("the June 6th Resolution"), after a telephonic meeting of the Board, Sean Lyons, the managing agent of the building, and, also, the disclosed agent of the Board, e-mailed Lusk that "The Board will approve [the Proposed Sale] under two conditions": (1) Lusk was required "to add an additional $125,000 (net cash) [into his] savings account, and cash on hand post-closing & renovation"; and (2) Lusk was required to enter into an escrow agreement, pursuant to which one years' maintenance ($26,652) was to be held in the co-op's escrow account for one year. As Lusk points out, the Board and its managing agent did not reserve any power to modify or change the terms of its approval. Indeed, in their August 31, 2018 Answer, respondents state, "Considering all of the circumstances, the Board advised Mr. Lusk that it would conditionally approve his purchase of 5E if he increased the cash balance in his bank account by $125,000 before the closing and placed 12 months of maintenance in escrow for a year."

In a June 8, 2018 e-mail Lusk accepted the approval including the enumerated conditions. In order to satisfy these conditions, Lusk borrowed money from his father's retirement account and deposited the $125,000 into his savings account, thus satisfying the first condition. It is undisputed that Lusk entered into an escrow agreement for one-year maintenance for the combined apartments and deposited those funds into the co-op's escrow account, thus satisfying the second condition.

On June 20, 2018, Lusk sent the Board bank records confirming the deposit of new funds ($125,000) into his savings account. On June 22, 2018 ("the June 22nd Resolution"), Lyons, on behalf of the Board, sent Lusk an email notifying him of the Board's attempt to rescind its June 6th Resolution and detailing the Board's new offer, which, inter alia, required Lusk to deposit $125,000 in escrow, rather than the previously agreed-to sum of $26,652. The Board alleges that after it consulted with co-op's counsel, she stated that the nature of Lusk's loan from his father raised a number of legal issues and concerns, and that the Board should either reject the Proposed Sale in whole, or require Lusk to place $125,000 in escrow for at least one year. The June 22nd Resolution also provides that if Lusk did not comply and deliver additional funds by June 29, 2018, "the offer [would be] rescinded and the Board will reject the purchase of apartment 5E and the combination of apartments 5D & 5E." Lusk did not accept the new conditions and did not deliver additional funds. On July 5, 2018, Lyons informed Lusk via email that the Board had purportedly rescinded its offer and rejected his purchase of Unit 5E.

On July 31, 2018, Lusk commenced the instant proceeding, seeking a declaratory judgment annulling the June 22nd Resolution and reinstating the June 6th Resolution approving the Proposed Sale, subject to the original two conditions, which he has already satisfied. Lusk argues, inter alia: (1) that the June 6th Resolution is a binding commitment upon which he was entitled to rely; (2) that the Board's arbitrary decision to attempt to rescind the June 6th Resolution is not protected by the Business Judgment Rule; (3) that the Board violated its bylaws by failing to provide notice to all directors of a special meeting, failing to convene a quorum, and failing to maintain minutes; and (4) that the Board improperly denied his request to inspect the co-op's books and records.

On August 31, 2018, respondents served an answer, arguing, inter alia: (1) that the June 22nd Resolution is protected by the Business Judgment Rule, as the Board may reject the Proposed Sale "for any reason or no reason"; (2) that Lusk failed to demonstrate discriminatory animus or bad faith on the Board's part in reaching the June 22nd Resolution; (3) that having followed co-op counsel's advice, Lusk is barred from asserting that the Board's decision was made in bad faith; (4) that the Board was not precluded from changing the conditions under which it would approve the Proposed Sale, as the June 6, 2018 email was not a formal resolution; (5) that the Board did not violate the co-op's bylaws; and (6) that Lusk's demands for books and records are moot, as they have already been satisfied.

Discussion

Pursuant to the Business Judgment Rule, courts exercise restraint and defer to good faith decisions made by boards of directors in business settings. See Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 538-39 (1990) ("the business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes") (internal quotations omitted). However, the Business Judgment Rule does not foreclose inquiry by courts into whether a co-op may rescind approval of a proposed sale of a unit within its building if it otherwise would be an impermissible breach of contract. See Barbour v Knecht, 296 AD2d 218, 224 (1st Dept 2002) ("The business judgment rule is not an insuperable barrier, however, and permits review of improper decisions") (internal quotations omitted); see also 40 W. 67th St. v Pullman, 100 NY2d 147, 153-54 (2003) ("In adopting this rule, we recognize that a cooperative board's broad powers could lead to abuse through arbitrary or malicious decisionmaking"). Simply put, the Business Judgment Rule is not a get-out-of-jail-free card protecting any and all board activity.

Here, the June 6th Resolution was a conditional but binding commitment upon which Lusk was entitled to rely. See Demas v 325 W. End Ave. Corp., 127 AD2d 476, 477-78 (1st Dept 1987) ("This resolution was, on its face, a binding commitment upon which plaintiffs were entitled to rely. ... The [Board] resolution was complete and unambiguous on its face"). Thus, the Board's rescission of its decision to approve the Proposed Sale detailed in the June 6th Resolution was improper and is not protected by the Business Judgment Rule. See Dinicu v Groff Studios Corp., 257 AD2d 218, 222-23 (1st Dept 1999) ("while it may be good business judgment to walk away from a contract, this is no defense to a breach of contract claim. Thus, the Business Judgment Rule does not protect [respondents] from liability"); see also Whalen v 50 Sutton Place S. Owners, 276 AD2d 356, 357 (1st Dept 2000) ("while it may be good business judgment to walk away

from a contract, this is no defense to a breach of contract claim"). Respondents' argument that the June 6th Resolution does not constitute a formal resolution is unavailing; case law permits judicial review of "improper decisions," not just formal resolutions, and respondents concede that the Board conducted a telephonic meeting in which all four then-current directors participated and unanimously voted to approve Lusk's application (with the subject conditions). Respondents' argument that the Board rescinded its June 6th offer because it was concerned with Lusk's method of financing the additional funds (i.e., borrowing the money from his father) and, hence, his post-closing liquidity, is equally unavailing; the June 6th Resolution does not (although it easily could have) condition how Lusk was to obtain additional funds, or that he was not allowed to borrow them. In other words, the Board is estopped from setting conditions that were not already contained in the June 6th Resolution.

This Court is surprised at respondents' attempt to rely on the following two First Department cases: Hirschmann v Hassapoyanes, 52 AD3d 221 (1st Dept 2008), and Kallop v Board of Directors for Edgewater Park Owners, 155 AD3d 491 (1st Dept 2017). In both instances, the courts refused to let the subject boards rescind their offers (albeit for reasons inapplicable here). You cannot rely on case in which courts refused to let co-op boards rescind decisions for the proposition that boards can rescind their decisions.

The Court has considered respondents' other arguments and finds them to be unavailing and/or non-dispositive.

Accordingly, this CPLR Article 78 petition is hereby granted.

Conclusion

Petition granted. The clerk is hereby directed to enter judgment in favor of petitioner, Andrew Lusk, and against respondents, 170 West 81st Owners Corp., Michelle Simmons, John Reardon, Gabriel Sperber, and Mary Anne Nidiry, (1) annulling respondents' June 22, 2018 resolution rescinding its prior approval of petitioner's application to purchase Unit 5E in the cooperative building located at 170 West 81st Street, New York, NY 10024, and (2) restoring respondents' June 6, 2018 resolution approving petitioner's application to purchase the same, subject to certain conditions, which conditions petitioner has already satisfied.

9/14/2018
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Tanya R. Kennedy Justice PART 63

M+E 13-15 LLC

-v-

57 Fusion LLC

INDEX NO. 153655/2012
MOTION DATE
MOTION SEQ. NO. 008
008

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is granted for the reasons set forth in the court's oral decision following oral argument on September 5, 2018. It is further ordered that the Clerk of the Court shall enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs. It is further ordered that the Clerk of the Court shall cancel the Notice of Pendency filed in this matter.

The Court shall issue a separate Order of Reference To Hear And Report on the issue of the award to defendant of costs, expenses and attorneys' fees incurred in connection with this action pursuant to CPLR 6514(c).

The plaintiff's cross-motion for sanctions is withdrawn.

This constitutes the Decision and Order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 5, 2018

Hon. Tanya R. Kennedy J.S.C.

TANYA R. KENNEDY J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. TANYA R. KENNEDY PART 63
Justice

----------X

M & E 73-75 LLC,

Plaintiff,

INDEX NO. 153655/2012

MOTION SEQ. NO. 008

ORDER OF REFERENCE TO HEAR AND REPORT

- v -

57 FUSION LLC,

Defendant.

----------X

This matter having come on before this court on September 5, 2018 on the motion of defendant to dismiss the complaint, to dismiss the notice of pendency and an award of costs, expenses and attorneys' fees incurred in connection with this action pursuant to CPLR 6514(c), and the Court having issued a separate order, dated September 5, 2018, granting the motion to dismiss the complaint and the notice of pendency, and for an award of costs, expenses, and attorneys' fees pursuant to CPLR 6514 (c), it is

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose:

(1) The issue of the award to defendant of costs, expenses and attorneys' fees incurred in connection with this action pursuant to CPLR 6514 (c); and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646–386–3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for defendant shall, within 15 days from the date of this order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein, and that, as soon as practical thereafter, the Special Referee shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until

completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

September 5, 2018
DATE

HON. TANYA R. KENNEDY, J.S.C.
TANYA R. KENNEDY
J.S.C.

CHECK ONE:	☐	CASE DISPOSED	☐	DENIED	☐	NON-FINAL DISPOSITION	☐ OTHER
	☐	GRANTED			☐	GRANTED IN PART	
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☒ REFERENCE

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D56310
G/hu

_____AD3d_____ Argued - April 17, 2018

CHERYL E. CHAMBERS, J.P.
SANDRA L. SGROI
JOSEPH J. MALTESE
FRANCESCA E. CONNOLLY, JJ.

2017-03433 DECISION & ORDER

Philip Perrault, appellant, v Village Dunes Apt. Corp., respondent.

(Index No. 9841/14)

Tarbet & Lester, PLLC, East Hampton, NY (Brian J. Lester of counsel), for appellant.

Tromello, McDonnell & Kehoe, Melville, NY (A.G. Chancellor III, of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from a corrected order of the Supreme Court, Suffolk County (John H. Rouse, J.), dated February 22, 2017. The corrected order granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that on the Court's own motion, the notice of appeal from an order dated February 16, 2017, is deemed to be a premature notice of appeal from the corrected order dated February 22, 2017 (*see* CPLR 5520[c]); and it is further,

ORDERED that the corrected order is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the defendant.

In 2003, the plaintiff purchased a unit in a cooperative building owned by the defendant, Village Dunes Apt. Corp. In 2013, the plaintiff requested that the defendant's board of

directors approve his proposal to, inter alia, raise the height of the ceiling in a portion of his unit by enclosing unfinished common-area space above his unit for his exclusive use, and to replace an existing window in his unit with one of a different type and size. The plaintiff's proprietary lease provided that the defendant could not unreasonably withhold its consent to a proposed alteration "in the unit or building." The board of directors denied the plaintiff's requests. The plaintiff commenced this action, inter alia, to recover damages for breach of contract and for an injunction authorizing the proposed alterations to his unit. The Supreme Court granted the defendant's motion for summary judgment dismissing the complaint by corrected order dated February 22, 2017. The plaintiff appeals. We affirm.

"In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination '[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith'" (*40 W. 67th St. v Pullman,* 100 NY2d 147, 153, quoting *Matter of Levandusky v One Fifth Ave. Apt. Corp.,* 75 NY2d 530, 538). However, where, as here, a proprietary lease provides that a governing board's actions in giving consent to alterations to the "unit or building" are to be reviewed under a reasonableness standard, the board's actions are not protected by the business judgment rule (*see Rosenthal v One Hudson Park,* 269 AD2d 144, 145; *Ludwig v 25 Plaza Tenants Corp.,* 184 AD2d 623). A board's actions are reasonable where they are "legitimately related to the welfare of the cooperative" (*West v 332 E. 84th Owners Corp.,* 68 AD3d 499, 500). Here, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that its withholding of consent for the plaintiff's proposed alterations to the ceiling of his unit and the replacement of his window was reasonable (*see West v 332 E. 84th Owners Corp.,* 68 AD3d at 499-500; *Fried v 20 Sutton Place S.,* 2 AD3d 351; *see also Seven Park Ave. Corp. v Green,* 277 AD2d 123, 123-124). In opposition, the plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York,* 49 NY2d 557, 562).

The plaintiff's remaining contention is without merit.

Accordingly, we agree with the Supreme Court's determination to grant the defendant's motion for summary judgment dismissing the complaint.

CHAMBERS, J.P., SGROI, MALTESE and CONNOLLY, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM
Justice

----------X

JOSE CRUZ, MAHMOUD ELDWARDANY, DEBORAH FINSTON, JOHN TOMASZEWSKI, DONALD WEST,

Petitioner,

for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- v -

SEWARD PARK HOUSING CORPORATION, DAVID PASS, CLINTON GRAND PARKING L.L.C., ICON PARKING SYSTEMS, L.L.C.,

Respondent.

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INDEX NO. 155244/2016

MOTION DATE 5/1/18

MOTION SEQ. NO. 005

DECISION AND ORDER

Arthur F. Engoron, J.S.C.

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 5, were used on respondents' motion, and petitioner's cross-motion, to confirm in part and reject in part a special referee's report on attorney's fees:

	Papers Numbered:
Notice of Motion - Affirmation - Affidavit - Exhibits	1
Affirmation in Opposition - Affidavit	2
Reply Affirmation	3
Petitioner' Reply Letter (June 28, 2018)	4
Respondents' Reply Letter (July 2, 2018)	5

Brief Background

Respondent Seward Park Housing Corporation ("Seward Park") owns a well-known housing complex on the storied Lower East Side of Manhattan. Petitioners are cooperators who, before the events here in issue, had long-term, relatively inexpensive licenses to park their cars in Seward Park's garage. On January 27, 2016 Seward Park's Board of Directors voted to switch from a "park-and-lock" system to a "valet parking" system and to have respondent Clinton Grand Parking L.L.C. ("Clinton Grand"), a subsidiary of respondent Icon Parking Systems, L.L.C., operate it. The next day, Seward Park notified the cooperators of the vote. Almost immediately, certain cooperators/licensees publicly and vociferously objected. On March 2, 2016 Seward Park's Board voted to approve a proposed contract with Clinton Grand ("the Contract"). The objections continued.

On or about June 22, 2016 petitioners filed the instant CPLR Article 78 Petition, seeking to annul the Board's decisions on various grounds, including that the Board failed to provide proper advance notice of the votes; that the Board exceeded its authority; and that the Contract is illegal. On or about July 21, 2016 respondents moved to dismiss the petition, primarily on the grounds that the petition was untimely and that the Business Judgment Rule insulated the Board's actions. On or about September 1, 2016 petitioners cross-moved for sanctions for frivolous litigation and various alleged bad acts. On or about September 19, 2016 respondents replied to the opposition to their motion and opposed the cross-motion. In a Decision and Order dated July 19, 2017 this Court dismissed the

petition on the ground of untimeliness, while also addressing the Business Judgment Rule and other issues, and sent respondents' request for attorney's fees, for which petitioners' proprietary leases provided, to a referee to hear and report.

Respondents' attorneys, Greenberg Traurig, LLP ("GT"), requested $254,000 in attorney's fees for all work, including pre-hearing letter briefs and preparing for the hearing, up to, but not including, the one-day hearing before Special Referee Louis Crespo on September 20, 2017. Referee Crespo issued a 23-page report, dated December 22, 2017, recommending that respondents be awarded $161,000, having reduced the amount requested due to alleged double billing, block billing, lack of complexity, failure to use more associate (as opposed to partner) time, and other miscellaneous grounds. On or about January 22, 2018 respondents moved to affirm in part and reject in part the recommendations. Respondents agreed with the recommendations that GT's hourly rates were reasonable and that the GT attorneys performed the work that they claimed, etc., but disagreed with the Referee's recommendation about double and block billing and the other grounds for reducing the fee award. Furthermore, pursuant to the co-op's by-laws, Seward Park was entitled to "fees on fees," and GT requested (as indicated in a July 3, 2018 e-mail to the Court) an additional $166,396 for (1) the fee hearing itself and post-hearing submissions ($39,124) and (2) to analyze the Referee's Report and move to confirm/reject it ($127,272).

On or about March 31, 2018 petitioners cross-moved to affirm in part and reject in part the Referee's recommendations. In their mirror-image cross-motion, petitioners argued that this litigation raised neither novel nor difficult questions; that the reductions for block and double billing were correct; but that the award should be further reduced by $40,000 because GT's hourly rates were excessive and GT used partners, rather than associates, for the bulk of the work. In their reply papers, for which respondents have requested an additional $37,827, respondents parried petitioners' cross-motion and further supported their motion. In total, respondents are requesting $464,164 ($254,000 + $39,124 + $127,272 + $37,827 + $5,941 in disbursements).

Case Law

A classic formulation of the factors that determine the reasonableness of a fee request was delivered by Chief Judge Breitel in Matter of Freeman, 34 NY2d 1 (1974):

> Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved. Significant in the inclusion is the factor of the amount involved.

Id. at 9 (citations omitted).

One Perspective

That a law firm is asking for the staggering sum of $464,164 to have prevailed upon a court to dismiss as untimely a relatively straightforward CPLR Article 78 Petition commenced by several middle-class tenants responsible for attorney's fees is shocking and disturbing, highway robbery without the six-gun. Society cannot devote such huge resources to such a simple court proceeding (which, after all, accomplished nothing) and survive, much less prosper. Such an outrageous figure sounds like a typographical error or an April Fool's joke; if it is not, it merits "fee shaming," public humiliation, and possible sanctions. For such egregious overreaching, a court could, and maybe should, award nothing. After all, these days, that same $464,164 (incidentally, significantly more than twice the $208,000 annual salary of a New York State Supreme Court Justice; 223% to be exact) could buy you a one-bedroom co-op apartment on the Upper East Side of Manhattan, at First Avenue and 72nd Street, a stone's throw from the new Second Avenue Subway Line, with a 24-hour doorperson, live-in resident manager, concierge, laundry room, and on-site parking garage (a particularly nice amenity!). If you are

bargain-hunting, $400,000 could buy you a one-bedroom co-op apartment in Bay Ridge, Brooklyn, near the old "R" Subway Line, with a live-in super, washer-dryer, high ceilings, and almost 1,000 square feet. If you are tired of apartment living, but still want a short commute, $450,000 could buy you, free and clear (no mortgage, same as the apartments), your very own private house in suburban Elmont, Nassau County, just over the Queens border, with more than 1,200 square feet of indoor space, four bedrooms, three baths, a finished basement, updated kitchen, and a "great" backyard (emphasis in the original). The point being that we are not talking mere Monopoly money here!

Another Perspective

GT's papers are long, and they are beautiful: well-organized, well-written, and well-reasoned. They are predictable, but in the best sense of that term; GT argued just what you would expect, just what it had to, and just how it had to. They were lengthy of necessity, because petitioners' original attorney (who was not on the fee request) made life difficult for respondents, with unfounded accusations of improprieties, the request for sanctions, and matters that, if not strictly relevant, no lawyer worth his or her salt would ignore. Fish gotta swim, birds gotta fly, and lawyers gotta litigate. Arguments made in moving papers could also be found in reply papers, ad nauseum, etc., but that is how lawyers usually argue, and sometimes win, cases. In short, GT did what lawyers do, submitted excellent papers, and prevailed.

Discussion and Disposition

This Court, for the most part, grants respondents' motion to confirm in part and reject in part the Referee's report. In particular, the Court confirms the Referee's findings that GT's hourly rates, some of which topped $1,000 per hour, were reasonable (high, but arguably reasonable), and that its attorneys performed the work they claimed, etc. The Court rejects the findings (1) that the amount awarded should be reduced because of double billing, as, for all that appears, the attorneys were collaborating, not duplicating; (2) that the block billing was improper, because determining what work GT did, and that the work was on this case, was easy enough; and (3) that GT should have used more associate time, because experienced partners charge more but work quicker.

However, the Court takes issue with the time spent on respondents' cross-motion to dismiss, other than the time spent on the Statute of Limitations argument. CPLR 7804(f) provides that a "respondent may raise an objection in point of law by setting it forth in ... a motion to dismiss the petition, made ... within the time allowed for [an] answer." Such a motion should be limited. "On a pre-answer motion pursuant to CPLR 7804(f) ... [n]o additional facts alleged in support of the motion may be considered. Since those branches of the [respondent's] motions which were to dismiss the petitions did not seek dismissal based upon an objection in point of law, but instead sought relief on the merits, the Supreme Court properly, in effect, denied those branches of the motions." 1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Village of Garden City, 62 AD3d 1004, 1006 (2d Dept 2009). To similar effect is the following: "The courts frown on the making of a motion by a respondent on the presumably narrow ground of a single defense while at the same time including on the motion all the evidence the respondent has on the merits and asking that it be allowed to serve an answer if the motion is denied. It amounts to the respondent's attempt to get two bites at the apple." David D. Siegel and Patrick M. Connors, New York Practice § 567, at 1089 (6th ed. 2018). Here, respondents' Statute of Limitations defense was based on a point of law (and succeeded). However, its Business Judgment Rule defense was more of a factual defense on the merits. Certainly, in their papers, respondents argued vociferously that the petition was untimely. Respondents would have achieved the same result -- dismissal with prejudice -- had this been their only argument; there was no need to make a double-barreled motion. Of course, had the limitations defense failed, respondents could have served an answer asserting the Business Judgment Rule defense and any others it chose.

Such simplicity would have worked its way all down the line: in analyzing petitioner's opposition papers; in drafting reply papers; in preparing for oral argument; in in-court time; and even in the fee application. For example, respondents' underlying moving brief devotes 10 pages to their Business Judgment Rule defense; their reply brief adds another seven pages. Had respondents' defense been limited to untimeliness, the savings would have been considerable.

Taking the broadest possible perspective, this Court is troubled, almost haunted, by the idea of awarding almost half a million dollars to attorneys who simply prevailed upon a court to dismiss an untimely proceeding, and not in the context of industrial or technological behemoths battling each other for market supremacy, but in the context of a handful of middle-class cooperators upset with a Board of Directors' decision (and who presumably paid their own two sets of attorneys).

Cultural change may be in the offing. By requesting astronomical fees, attorneys are in danger of killing the goose that laid the golden egg.

> Litigation tends to be lengthy and expensive. * * * Courts, attorneys and litigants can all take steps to prevent civil cases from becoming pricey boondoggles. * * * [Attorney's fees should be] at a cost that [is] proportionate to the nature of disputes. * * * The City Bar is . . . asking attorneys to eschew litigation tactics like asserting defenses ... that could ... burden the parties.

Andrew Denney, *NYC Bar Association Urges New Approaches to Streamline Civil Litigation*, New York Law Journal, June 27, 2018 at 1 and 2. Fees are zooming out of control, and Courts should not be complacent; rather, we should be on the front line, not the sideline, leading the charge to keep them reasonable (keeping in mind the considerable costs of running a law practice). To focus solely on GT's rates and hours would be to miss the forest for the trees.

As petitioners point out, the Second Circuit has memorably stated that a litigation loser "should not have to pay for a limousine when a sedan could have done the job." Simmons v New York City Transit Auth., 575 F3d 170, 177 (2d Cir. 2009). This case should have been litigated, and would have been dismissed, solely on Statute of Limitations grounds. Even if that had not succeeded, respondents would have prevailed on their business judgment rule defense; the limitations argument was not life-or-death; gold-plated lawyering was not needed. GT probably needed two partners to do everything it did as well as it did. But another approach could have achieved the same result: the partner in charge could have walked out into the hallway, grabbed the first mid-level litigation associate that walked by, and said, "Our client is being sued; it's untimely; get it dismissed." Such an approach would, the Court finds, have resulted in fees, including disbursements, of not more than $175,000 (which may not seem like an awful lot of money, but could buy you a 55-foot yacht, equipped with multiple staterooms; a salon/galley/dining area; a washer-dryer; and stall showers). To this Court, that's reasonable.

Conclusion

Motion and cross-motion granted in part, denied in part. The referee's report is hereby affirmed in part and rejected in part, as indicated herein; respondents, jointly and severally, are entitled to a fee of $175,000, including disbursements, against petitioners Jose Cruz, Deborah Finston, John Tomaszewski and Donald West (petitioner Mahmoud Elwardany having settled out), jointly and severally, with interest from the date of entry of judgment; and the clerk shall enter judgment accordingly.

7/6/2018
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

[*1]

811 Walton Tenants Corp. v 811 Walton Rescue LLC
2018 NY Slip Op 51021(U) [60 Misc 3d 133(A)]
Decided on July 2, 2018
Appellate Term, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 2, 2018
SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
PRESENT: Ling-Cohan, J.P., Cooper, Edmead, JJ.
570158/18

811 Walton Tenants Corp., Petitioner-Landlord-Appellant,

against

811 Walton Rescue LLC, Respondent-Tenant-Respondent, and Thomas Smith, Respondent-Undertenant.

Landlord appeals from an order of the Civil Court of the Civil Court of the City of New York, Bronx County (Elizabeth J. Yalin Tao, J.), dated November 16, 2017, which granted tenant's motion for summary judgment dismissing the holdover petition, without prejudice, and denied, as moot, landlord's cross motion to dismiss affirmative defenses.

Per Curiam.

Order (Elizabeth J. Yalin Tao, J.), dated November 16, 2017, affirmed, with $10 costs.

Civil Court properly granted tenant's motion for summary judgment dismissing the holdover petition. The undisputed evidence establishes that the cooperative landlord failed to follow the requisite procedures, set forth in paragraph 31 of the proprietary lease, in terminating the lease based upon tenant's "noncurable" objectionable conduct (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 155-156 [2003]; *1050 Tenants Corp. v Lapidus*, 39 AD3d 379, 383 [2007], *lv denied* 9 NY3d 807 [2007]; *Breezy Point Coop., Inc. v Young*, 16 Misc 3d 101, 104 [2007]), including

obtaining authorization by a vote of two-thirds of the board of directors at a meeting called for that purpose (Paragraph 31[f]) (*see Gordon v 476 Broadway Realty Corp.*, 129 AD3d 547, 548 [2015]; *Lincoln Guild Hous. Corp. v Ovadiah*, 49 Misc 3d 147[A], 2015 NY Slip Op 51691[U] [App Term, 1st Dept 2015]). We reject landlord's contention that it has the power to terminate the lease based upon objectionable conduct absent compliance with the procedures set forth in paragraph 31 (*see 40 W. 67th St. Corp. v Pullman*, 100 NY2d at 155-156).

In light of this determination, landlord's cross motion was properly denied as moot.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: July 02, 2018

Return to Decision List

Manzanet-Daniels, J.P., Tom, Andrias, Kapnick, Singh, JJ.

6796 Fairmont Tenants Corp., Index 152489/15
Plaintiff-Respondent,

-against-

Michael Braff,
Defendant-Appellant,

Gladys Wanich,
Defendant.

Michael Braff, New York, appellant pro se.

Boyd Richards Parker Colonnelli, P.L., New York (Jennifer L. Stewart of counsel), for respondent.

Order, Supreme Court, New York County (Melissa Crane, J.), entered on or about October 10, 2017, which granted plaintiff coop's motion for summary judgment, denied defendant Braff's motion for summary judgment, and declared that plaintiff has right, title, and interest to the roof adjacent to apartments 2F and 2G, and enjoined defendants from occupying or using that space, unanimously affirmed, with costs.

There are no issues of fact requiring a trial. The proprietary lease defines the apartment as "the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned

rooms, *which are allocated exclusively to the occupant of the apartment*" (emphasis added). This clause is ambiguous because it is unclear from the lease whether the disputed roof area has been exclusively assigned to defendants. As such, the court properly looked to extrinsic evidence, including the offering plan (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277-278 [2005]), which is a "controlling document" that gives the proprietary lease meaning (*see Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 78-79 [1st Dept 2008]; *see also Rotblut v 150 E. 77th St. Corp.*, 79 AD3d 532, 532 [1st Dept 2010]; *Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601, 603 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010]; *1050 Fifth Ave. v May*, 247 AD2d 243, 243 [1st Dept 1998]). The offering plan makes clear that there is no outdoor space allocated exclusively to defendants' apartment.

Supreme Court also properly granted plaintiff summary judgment dismissing defendants' waiver defense and counterclaim. Paragraph 26 of the lease addresses "facilities outside the apartment," and under this provision, the Coop has a revocable license to that area (*see Prospect Owners*, 62 AD3d at 602). Further, the coop's knowledge of defendants' use of the roof space does not raise issues of fact regarding the coop's waiver of a right under the lease in light of an unambiguous no waiver

clause (*see 457 Madison Ave. Corp. v Lederer De Paris, Inc.*, 51 AD3d 579 [1st Dept 2008]; *Rotblut*, 79 AD3d at 532-533).

Supreme Court also properly dismissed defendants' adverse possession defense and counterclaim. It is undisputed that defendants have permitted workmen on the roof at issue in 2015, and that they have given access to the roof space to building staff from time to time. Accordingly, the court properly found that defendants' use of the roof space was not "exclusive" for any period of time prior to 2015 (*Keena v Hudmor Corp.*, 37 AD3d 172, 173-174 [1st Dept 2007]; *see Brand v Prince*, 35 NY2d 634, 636 [1974]).

Finally, defendants' continued trespassing on the roof space entitles the coop to injunctive relief as the irreparable injury is the interference with the coop's property rights (*see Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504, 504 [2d Dept 2002]; *see also 1050 Fifth Ave.*, 247 AD2d at 243).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 7, 2018

CLERK